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Supreme Court, U.S.
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In The Supreme Court
of the
United States

OCTOBER TERM, 1990

No.

BLACK CRYSTAL COMPANY, INC.,
Petitioner

V

FIRST NATIONAL BANK OF
LOUISVILLE
Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Given the conflicts of testimony and interpretations of factual developments in this case, did the courts properly construe the evidence and inferences therefrom in the light most favorable to Petitioner in accordance with standards for summary judgment?

2. Did the courts take proper notice of the provisions of the Uniform Customs and Practice for Documentary Credits (UCP), as sanctioned by the Uniform Commercial Code, Article 5-102(4), in interpreting the facts bearing on First National Bank's actions in regards to this letter of credit?

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in BLACK CRYSTAL CO.,INC.[1] v. FIRST NATIONAL BANK OF LOUISVILLE, et al. No. 88-5650 below.

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[1] see APPELLATE BRIEF p.28: "Pursuant to 6th.Cir.R.25 - DISCLOS. OF CORP. AFFILIATIONS AND FINANCIAL INTEREST", dated July 28, 1989.

OPINIONS BELOW

The District Court found that on May 25, 1981, Petitioner sent a telex to Respondent bank to notify Taipei bank that Petitioner wanted the credit confirmed. Respondent sent a telex on behalf of Petitioner to Taipei bank reciting Petitioner's request. Two days later, on May 27th, 1981, Respondent, in its own behalf sent another telex to Taipei bank requesting authorization to confirm. The Respondent telex stated ("URGENT, URGENT, URGENT") in part: "Please authorize us by telex tested to confirm this letter of confirmation. Also please amend L/C to read: 'Available against Beneficiary's drafts drawn on Respondent bank of Louisville, Kentucky at 180 days after sight for full invoice cost!'"

On May 28, 1981 Taipei bank by telex agreed to a confirmation of the credit and authorized Respondent to confirm, but

stated that "All other terms and conditions remain unchanged."

The lower court, in the present case: Respondent confirmed Taipei bank credit in Amendment No.9 thereto, the confirmation contained terms at variance with the original credit. Specifically, the confirmation stated that Respondent would pay under the credit 1) on payment of $2,000 of confirmation fee, 2) on drafts presented by United Kentucky Bank, 3) on drafts in conformity with the terms of the credit, and 4) upon reimbursement by the Bank of California International. Those varying terms did not serve to alter the credit, but created a separate, parallel obligation on the part of the Respondent to pay, provided that the confirmation terms and conditions were met. The confirmation was assented to by Brian Perry, Black Crystal. Petitioner now claims that Perry did not understand the confirmation and that he did not have authority to

agree to the confirmation on behalf of Petitioner. The lower court agreed that this is a genuine dispute of fact, but is not material to the resolution of this case.

If Perry were without authority to assent to the confirmation, than the confirmation was presumably ineffective. If the confirmation was ineffective, then Respondent did not "confirm" UCP and was not obliged to pay according to the confirmation. Therefore, Respondent had no obligation to honor UKB presentation of documents and demand for payment, where it was made. On the other hand, if Perry did have authority to assent then Respondent did "confirm" the credit and was obliged to pay according to the confirmation terms. The undisputed facts reveal however, that Petitioner did not meet all of the terms of the credit.

The court order of the Summary Judgment found, the confirmation set June 30, 1981 as

the final date for shipping the coal, and July 10, 1981 as the expiration date of the credit. Thus this court ruling shows, coal was shipped and the presentation was made after the deadline set for each. Because Petitioner did not meet either these deadlines, Respondent was within its right in refusing to honor UKB's demand for payment.

Petitioner implicitly argues that it was unjustifiably prevented from meeting the shipping and expiration dates in the credit as a direct result of Respondent failure to send an authenticating telex to Banco Urquijo. The court cannot agree, Respondent was under no obligation to send or receive telexes for or on behalf of Petitioner. Therefore, Respondent was justifiably within its rights in failing or refusing to send such a telex. Petitioner offers no other proof that Respondent maliciously or in bad faith failed to send the telex, see KY. Rev.

Stat. 355.5 - 109(1).

In the absence of such evidence, Respondent cannot be held liable for the problems between Petitioner and its shipper which may have caused Petitioner to miss the credit deadlines, see KY. Rev. Stat. 355.5 - 109(1)(b).

Petitioner alleges that UCP Article 41. gave Petitioner 21 days after July 10, 1981 to present the documents and a draft. The court cannot agree.

Consequently, Art. 13 does not by its terms apply to Respondent's petition in this case. Respondent, as discussed above, was a confirming bank and under its confirmation it had the obligation to pay money upon presentation of a draft by UKB which was in conformity with the credit. Moreover, Respondent had not only the right but the duty to its customer, Taiwan bank, to inspect the documents before payment and to insist upon

strict compliance with the terms of the credit, including adherence to the stated shipping and expiration date. In Petitioner's view, these rights and duties fell to UKB as the negotiating bank. The district court cannot agree.

Petitioner asserts that it selected UKB as the negotiating bank and that UKB received, reviewed and approved all the documents presented by Petitioner amounted to negotiation, as a matter of law. Relying on UCP Art. 13. Petitioner then argues that once the documents were negotiated that Petitioner had fulfilled its contractual obligations under the credit. At that point Petitioner concludes, Petitioner had the right to payment and Respondent had an obligation to pay. Under Petitioner theory, under negotiation, Respondent no longer had the right to inspect the documents presented for discrepancies, nor the right to refuse pay-

ment of the credit draft on the basis of variance with the terms of the credit. The Court cannot agree.

Nevertheless, the District Court Order of Summary Judgment stated that on July 27, 1981 representatives of UKB and Petitioner visited the New York office of the Bank of California and delivered documents intended to be in satisfaction of the terms and conditions of the credit. The Bank of California examined the documents, found discrepancies and refused to pay. A Petitioner representative returned to the Bank of California office on July 28, 1981 with proposed amendments but the Bank still refused to pay. The Bank of California sent a telex to UKB on July 29, 1981 enumerating the discrepancies in the documents and calling attention to the instruction from Taipeibank not to pay. The District Court, first can find no support for Petitioner position in the case

law or legal treaties dealing with the UCC or the UCP or the law of documentary credits generally.

In the credit in this case, the only third bank nominated by the issuing bank as a reimbursing bank was the Bank of California.

COURT OF APPEALS

On appeal, the Court of Appeals fully agreed on the District Court Summary Judgment and adopted its perspective as it was its own written opinion. "There is no genuine issue as to any material fact."

COURT OF APPEAL'S REASONING

On appeal, the Court of Appeals upheld the District Court's finding "for the reasons fully detailed by the District Court in its well-written opinion which we fully adopt as though it were our own, we affirm."

The Court of Appeals concluded after carefully examining the record, "we conclude

that Summary Judgment for Respondent was appropriate because there is no genuine issue as to any material fact."

A court deciding a motion for Summary Judgment must consider whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that the party must prevail as a matter of fact.

Anderson vs. Liberty Lobby. Inc. 477 U.S. 242-251-52 (1986)

"[O]n a motion for Summary Judgment the movant has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all influences to be drawn therefrom must be read in the light most favorable to the Party opposing the motion."

Blakeman vs. Mead Containers, 779 F. 2d 1146, 1150 (6th Cir.1985), quoting Smith vs. Hudson, 600 F. 2d 60, 63, (6th Cir),

Cert. Dismissed, 444 U.S. 986 (1979). Petitioner argues that the summary judgment was inappropriate in this case, because "the facts are immensely in dispute." Petitioner claims that it timely submitted the documents required by the court to UKB, a bank claimed by Petitioner to be a negotiating bank. The Court of Appeals did not accept this statement. The record according to the discovery of this court finds no support for the Petitioner claims.

The appeal finally does not allow the Petitioner argument that the District Court erred in failing to consider the application of Petitioner waiver and estoppel theories.

The court will not accept Petitioner's argument that UKB acted as a negotiator of the letter of credit.

The undisputed testimony of the UKB's Officer was that at no time did UKB negoti-

ate the letter of credit. On reviewing the supporting fact, we agree.

(Court of Appeals Case No. 88-5650: "Not Recommended For Full - Text Publication.") Sixth Circuit Rule 24 limits citation to special situations.

Petitioner requested rehearing en banc.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the ori-ginal panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. ACCORDINGLY, THE PETITION IS DENIED.

JURISDICTION

The district court filed its opinion on May 11, 1988, and timely notice of appeal was filed in the district court on June 16, 1988. The note for publication Opinion of the Court of Appeals was filed May 1, 1990. The Petition for Rehearing was denied on June 15,1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1332.

STATEMENT OF THE CASE

A. Lucky Cement Corp. Taipei, Taiwan signed a contract for delivery to Suoa, Taiwan, 126,000 Metric Tons of coal on January 30, 1981 with Black Crystal Co., Export Div., San Francisco, a General Partnership. The coal was to be shipped in five shipments, from 26,400 metric tons each, from the U.S.A to Taiwan. Lucky Cement had an irrevocable letter of credit issued by the City Bank of Taipei, Taiwan, for the benefit of Black

Crystal Company (hereinafter: Petitioner).

On February 18, 1981 the credit was sent by a tested telex to the First National Bank (hereinafter: Respondent) with the opening words, as follows: "Please advise thru United Kentucky Bank, Louisville, (hereinafter UKB). We open irrevocable Credit OTH2/00790/UO, Black Crystal Co., Inc., Export Div., San Francisco, CA. as beneficiary.[1].

The letter of credit did not designate a negotiating bank. The credit designated the Bank of California International, New York, as the reimbursing bank. The L/C did not appoint a negotiating bank [2]. The L/C was to be fully negotiatable credit to the bank the benificiary selected to be negotiating bank. It provided that beneficiary must establish a letter of guarantee or stand-by L/C for US$53,460.00 via advising bank as performance bond to the Taipeibank in Taiwan. It stated : "To the negotiating

bank only: Upon negotiation of the draft drawn under this credit Pls cable us of the amount negotiated for reimbursement. Pls draw at sight on the Bank of Calif Int'l New York for the face amount of the draft certifying in compliance with the credit terms and conditions..."

The credit stated the latest shipping date was March 29,1981.

The issuing bank requested that its L/C was "Subject to UCP for Documentary Credit (1974 Revision) Int'l Chamber of Commerce Brochure No. 290."

On February 20, 1981, Petitioner designated UKB its "Negotiation" bank. [3].

The first Assignment of Proceeds was issued February 20, 1981 to Brian Perry for the sum of $26,400.00. [4].

The draft was signed by Petitioner the assignee, and by an official of the UKB. In effect, by its agreement, UKB purchased the

draft of $26,400, and those in the various Assignments of Proceeds. See Appendix D.

Around March 27, 1981, the United Mine Workers Union went on strike, thereby causing a crisis in the coal-fields. Therefore Taipeibank on behalf of its customer, Lucky Cement, extended the expiration date of the L/C to April 25, 1981, through Amendment No. 6 [5] of the credit. Due to the United Mine Workers strike and extremely bad weather conditions with heavy rains persisting through May and early June, 1981, Petitioner requested and received two further extensions (Amendments No.7 and No.8) to the credit. The L/C was to expire on June 20, 1981.

On May 25, 1981, Petitioner requested that the L/C be confirmed by UKB. Petitioner sent two Western Union Mailgrams. The first mailgram was sent to UKB of Louisville. The mailgram asked UKB to telex the Taipeibank to request confirmation of the

L/C. The second mailgram was directed to the BOCal. The mailgram indicated that Beneficiary had instructed UKB to seek confirmation [6] of the L/C.

On May 26, 1981, UKB sent a telex to the Taipeibank on behalf of the Petitioner requesting confirmation of the L/C.

On May 27, 1981, Respondent sent a key tested telex labeled "URGENT", "URGENT", "URGENT", without any instructions or permission of the Petitioner, to the Taipeibank requesting authorization by Tested Telex to confirm the L/C, and also to amend the terms of the L/C to read "...available against beneficiaries drafts drawn on FNB at 180 days after sight."

Taipeibank responded on May 28, 1981: "...your tested/25-372 and telex May 27, 1981, please add your confirmation to this credit, confirmation fee at the beneficiary's account. All other terms and conditions

remain unchanged. This is an operative cable amendment." On May 29, 1981 Respondent had the L/C confirmed in its Amendment No.9 [7].

The buyer and the Beneficiary were never informed of the restrictions the Respondent entered in its Amendment No. 9.

The Taipeibank instructed Respondent to confirm the credit.This Amendment (no.9) was signed by a representative of UKB and Bryan Perry, Black Crystal [8]. The L/C was not a transferable credit [9]. The Respondent transformed the L/C into an Irrevocable Straight L/C [9a]. Henceforth the Respondent would only deal with the UKB and not with the actual Beneficiary.

Because of weather conditions, another extension was requested by UKB, on behalf of the Petitioner dated June 16, 1981. On June 22, 1981, the credit was extended to a shipping date of June 30, 1981 and an expiration date July 10, 1981.

June 17, 1981, the last barge was completely loaded and was en route to New Orleans. Belle Chase (New Orleans) was the point on the Mississippi River for loading upon the ocean vessel, EASTERN HORNET [10]. Cerbere & Co. Ltd.,London, UK, (Charterer) agreed on April 21st,1981, by telex to UKB to accept assignment of proceed for ocean freight charges. Cerbere's bank, Banco Urquijo requested Respondent bank to send a tested telex to confirm the credit. However, no such authentication was ever sent by the Respondent bank.

Respondent sent a telex to Cerbere & Co (Charterer) on June 26, 1981 stating that this assignment will become irrevocable at such time as Cerbere & Co Ltd. issue its commitment setting forth name of vessel, its Estimated Time of Arrival, and that vessel had been fixed; that no proceeds can be distributed until they are received by us [11].

Cerbere & Co canceled its Charter Party with Petitioner and claim liability for 126,000 metric tons (total of five shipments) of coal under contract. After the shipping date [12] of June 30, 1981 expired, demurrage charges started to accumulate on 16 loaded barges sitting in midstream.

Due to failure of authentication by Respondent bank the EASTERN HORNET went off market. Petitioner arranged transportation of the coal by spot charter of the vessel SAN NICOLAS from Antares Shipping and Trading Corp., San Francisco. The charter agreement was signed by the Petitioner in San Francisco on June 29, 1981. On July 7, 1981, UKB issued to Antares the last of its several Assignments of Proceeds and signed drafts to the Credit [13]. It retained the originals and mailed copies to each of the assignees.

On July 9 and July 10, 1981, Hassanain,

a V-P of UKB, Louisville, KY, went to New Orleans to observe loading of the coal onto the vessel SAN NICOLAS (see: Deposition pp. 55-70, 83-93, & 424-456 of Hassanain). Hassanain informed suppliers that his bank had received an Amendment extending the shipping and expiration dates to July 13, 1981. This information came from his bank in Louisville based on telex received from Taipeibank. Suppliers then released their possessory liens which permitted T.Smith & Sons, the stevedores, to load the steam coal into the hatches of the vessel.

Hassanain received B/L and commercial documents [14] and returned to Louisville on July 10, 1981. He testified at a deposition [15], that the L/C complied in a timely fashion to the terms and condition of the L/C. On beneficiary's first tender, the negotiating bank, UKB determined that the L/C complied in timely fashion to the terms and

conditions of the UCP.

July 10, 1981, the loading was completed and the vessel was ready to sail. Captain Traiforos, master of the SAN NICOLAS, authorized Sunrise Shipping Company to issue the B/L marked "Freight Prepaid on Board" covering the coal loaded on his vessel. Sunrise Shipping issued the B/L, Hassanain took possession of, on July 10, 1981 in New Orleans. Other documents then in Hassanain's possession were the Weight Certificate issued by SGS Control Services and the Commercial Testing & Engineering Co. analysis of the coal.

July 12, 1981 Hassanain mailed a letter to the BOCal. Intern'l, New York, to the attention of Mr. Lee [16], negotiating and collecting orders of commercial documents and a sight draft signed for $1,507,683.21 by Mr. Hassanain, VP, UKB.

On July 13, 1981, Hassanain sent ano-

ther letter to the Respondent bank for collection, enclosing the documents for the L/C #OTH2/00790/UO in favor of Petitioner. "Attached is a sight draft payable to UKB, Inc. in the amount of $1,507,683.21, signed Youssef Hassanain." [17].

July 13, 1981, Hassanain also mailed two sets of the documents required by the Credit to the Taipeibank. [18].

On July 12, 1981 Hassanain met Attorney Stephen Horner and Bryan Perry at the office of Attorney Horner. The meeting concerned two documents he had received, reviewed and taken possession of in New Orleans on July 10, 1981. He required that the Commercial Invoice that was already signed by the Beneficiary (Petitioner) before the expiration of the Credit be notarized along with the Supplier's Certificate [19]. The L/C did not call for any of the documents to be notarized. [20,21].

Hassanain stated in his deposition [22] that Jean Jackson, Respondent's representative, told him on July 13, 1981 that the L/C had expired and that the UKB signed draft [23], which he attempted to present to her would not be honored because Petitioner had not met its shipping deadline and therefore Respondent was not going to pay UKB for the draft.

On July 15, 1981, two days after Hassanain had sent the L/C documents to Taipeibank, Respondent bank received a Tested Telex from Taipeibank, its message to be relayed to UKB. See appendix E.

By test telexing the purported discrepancies to its correspondent bank, the Respondent bank, with instructions to relay the message to UKB, establishes that the Taipeibank had received the July 13, 1981 telex from UKB, now recognizing it as the negotiating bank. The telex refers to the

two sets of documents which UKB had air-mailed to the Taipeibank following the instructions of the L/C, which explicitly allowed the Beneficiary (Petitioner) to select his own Negotiating Bank (UKB). By this telex of July 15, 1981 to UKB, the Taipeibank has recognized UKB as the Negotiating Bank.

The Petitioner does not recognize the purported discrepancies because Petitioner, having presented the commercial documents within the expiry date of the credit, has never received the signed drafts and documents after they were tendered on July 10, 1981 to the officer of UKB (Hassanain), as it is required by the Official Comment 1 of 5-112 of the UCC.

On July 17, 1981, the BOCal, New York, received a telex from Taipeibank instructing the BOCal not to pay any reimbursement request under the credit. The telex went on to

state that payment should be made "only upon receipt of further instructions."

On July 20, 1981 Taipeibank bank telexed to Respondent bank message which was to be relayed to UKB.

"The payment under L/C OTH2/00790/UO is subject to satisfactory review from negotiating bank on collection basis. No payment is permitted at this moment."

Petitioner became aware of the telexes of July 17 and July 20, 1981 only after reading the District Court Memorandum Opinion [24].

Hassanain, would not give up the commercial documents unless the Assignments of Proceeds/drafts signed by UKB were honored and paid. The Taipeibank's customer Lucky Cement Corp. requested that its bank take the documents to BOCal Intern'l, New York.

On July 27, 1981 representatives of UKB and Bryan Perry visited the New York office

of the BOCal and delivered the documents. BOCal examined the documents and found the same purported discrepancies and refused to honor the credit. The BOCal was never authorized to and never made any payment under the Credit." [25].

Petitioner filed on July 30, 1982 its Third Party Complaint against Respondent of Louisville, KY and BOCal Inter'l, New York (Black Crystal's Third Party Complaint).

All cause of action by and among the various parties were either resolved by dismissal [26], judgment [27] or settlement [28], except for the Third Party Complaint of Petitioner against Respondent. On May 16, 1988, the U.S. District Court of the Western District of Kentucky (District Court) entered its Order granting Respondant's Motion for Summary Judgment against Petitioner (R.246: Order of Summary Judgment).

On June 15, 1988 Petitioner filed its Notice of Appeal in this matter (R.247: Notice of Appeal by Petitioner), and Pre-Argument Statement Rule No.9 on July 5,1988. Counsels Stephen G. Horner and John Wise withdrew as counsel for the Petitioner. The Petitioner's case was dismissed for failure to obtain counsel on January 12, 1989. This Appeal was reinstated on March 16, 1989.

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[1] 50 Amer.Jur. 2d Sec. 7.:
"A letter of credit addressed exclusively to an individual named therein is a special letter of credit, and as such is confined to the named individual and confers upon no one else the right to act upon it. The ordinary letter of credit falls within this category."

[2] [3202] Sec. 3-202 (1)1:
Negotiation is the transfer of an instrument in such a form that the transferee becomes

a holder. If the instrument is payable to order it is negotiated by delivery with any necessary endorsement; if payable to bearer it is negotiated by delivery.

[3] See J.A. vol II pp.30,31 Affidavit P. B. Parson, V-P and Mgr, Bank of Cal., Intern'l: "It was the responsibility of UKB as the negotiating bank, to determine that the shipping and other supporting documents were in order, in accordance with the terms and conditions of the credit."

[4] H. HARFIELD, Bank Credits & Acceptance. pp.191-92 (5ed. 1974):

...a beneficiary assign its rights to receive proceeds to the party from whom it obtains the goods. ...to satisfy its freight obligations out of the proceeds of the letter of credit.

[5] UCC-ICC Art.10(d):

Such undertaking can neither be amended nor canceled without the agreement of the issu-

ing bank, the confirming bank (if any), and the beneficiary. ...amendment is not effective without the agreement of all the above named parties.

(a): An exporter finds it necessary to make amendments to the credit, the exporter should contact the importer, since an advising bank does not have the authorization to initiate amendments.

[6] see Joint Appendix vol. II, p.14: Western Union Mailgram from Beneficiary to UKB: Credit to be confirmed, confirmation. (see vol. II, p.15: Western Union Mailgram from Beneficiary to Bank of Cal., New York: L/C confirmed in our behalf through our advising bank, UKB).

[7] ICC Banking Commission 1975-1981 - UCP Art.3(c):

"Soft Confirmation does not provide" partial acceptance of amendments, is not effective and should not be used without agreement of

all parties thereto.

[8] [3404] Sec. 3-404 (1):

Unauthorized Signatures

Sec. 1-201 (1): "Unauthorized Signature" is a defined term (Sec. 1-201). It includes both a forgery, and a signature made by an agent exceeding his actual or apparent authority.

[9] UCP-ICC art.54 (b) F. Transfer

A credit can be transferred only if it is expressly designated as "transferable", "assignable", and "transmissible", add nothing to the meaning of the term "transferable", and should not be used.

[9a] RODRIGUEZ R.M. & CARTER E.E., International Financial Managment (1986), p.163: with a "straight" L/C, the draft can only be presented to the paying bank designated in the L/C, whereas in a "negotiable" L/C a draft can be presented to any bank willing to act as paying bank.

[10] see Joint Appendix vol. II, p.11 Cerbere's telex to UKB accepting assignment of proceeds, dated Apr.22, 1981, Vessel (Eastern Hornet).

[11] see Joint Appendix vol. II, p.22, Cerbere's telex June 29, 1981 not accepting FNB's terms.

[12] see Joint Appendix vol. II, p.22, Cerbere's last telex communication holding Beneficiary liable, waiting for final bank to bank confirmation.

[13] see Joint Appendix vol. II, p.12, Western Union Mailgram from Beneficiary to UKB, dated 4/29/1981: allotments of funds available, assignments of proceeds to suppliers and other parties.

[13a] Appendix D: Assignments of Proceeds and sight drafts:

(1) to First National Bank July 11, 1981

(2) to Bryan Perry February 20, 1981

(3) to Keiko Sano Feister February 20, 81

(4) Greater Egyptian Energy June 13, 1981

(5) Antares Shipping & Trading Comp. July 7,1981.

[14] [5114] Sec. 5-114 (a): Issuer's Duty and Privilege to Honor Rights to Reimbursement: ... a holder in due course (Section 3-302) and in an appropriate case would make it a person to whom a document of title has been duly negotiated (Section 7-502) or a bona fide purchaser of a certificated security (Section 8-302).

[15] see Docket Sheet Nr. 66, pp.177,324-327, Deposition of Youssef A. Hassanain ...accepted the shipping documents, (commercial documents), found them to meet the terms of the L/C before the expiration date July 10, 1981.

[16] see Joint Appendix vol. II, pp.24,25: attached is is a sight draft payable to UKB.

[17] see Joint Appendix vol. II,pp.23,26,27: attached sight draft payable to UKB.

[18] see Joint Appendix vol. II, p.28: Telex to CBOT from UKB negotiating documents according to L/C terms for a negotiating bank only. Upon negotiation of draft drawn under this credit (see L/C OTH2/00790/UO).

[19] [5105] Sec. 5-105 Consideration No consideration is necessary to establish a credit or to enlarge or otherwise modify its terms.

[20] [3307] Sec. 3-307 Burden of Establishing Signatures, Defenses and Due Course (Sec. 1-201): It means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized the plaintiff is not required to prove that it is authentic.

[21] [3407] Sec. 3-407 (2) Alteration (a) Alteration by the holder which is both fraudulent and material discharges any party whose contract is hereby changed unless that party assents or is precluded from assenting

the defense.

[22] see Docket 66,Deposit. pp.114,174,179.

[23] see Joint Appendix vol. II, p.23 Signed Draft payable to the order of UKB: $1,507,683.21.

[24] Appendix E: Telex dated July 17, 1981 from CBOT to FNB.

[25] see Joint Appendix vol. II, p.19, Telex from Bank Of California to CTC, dated May 30, 1981: We hold in our possession reimbursement authorization.

[26] see Docket Nr. 20, dated Oct. 8, 1982 Third Party Complaint dismissed because it failed to comply with requirements.

[27] see Docket Nr. 229, dated June 6, 1986 Black Crystal should have judgment against Polykyn and Landaf, and recover from Polykyn and Landaf amount of $11,312,416.22 (Present date: Sept 11, 1990 being served in Athens, Greece to the Ministry of Foreign Affairs, U.S.State Department).

REASONS FOR GRANTING THE WRIT

The June 15, 1990 Sixth Circuit denied Petitioner's petition for Rehearing En Banc. The hearing panel "concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case." On May 1, the Court " record reveals no genuine issue of a material fact." The Sixth Circuit cited from a case decided in its own Court:

"{O}n a motion for summary judgment the movant has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion."

Blakeman v. Mead Containers, 779 F.2d 1146, 1150 (6th Cir.) (1985), quoting Smith v.Hudson, 600 F.2d 60, 63 (6th Cir.). cert. dismissed, 444 U.S. 986 (1979).

Petitioner argues that the lower courts have incorrectly applied the standard in this case.

The Petitioner finds it disturbing that the lower courts have difficulty in applying the articles of the UCP to the particulars of this case. Together with the language of the Credit, the (U.S.) UCC, Sec. 5-102(4) sanctions the application of the UCP in this instance:

"Unless otherwise agreed, this Art. 5 does not apply to a letter of credit or a credit if by its terms or by agreement, course of dealing or usage of trade such letter of credit or credit is subject in whole or in part to the Uniform Customs and Practice for Commercial Documentary Credits fixed by the Thirteenth or by any subsequent Congress of the International Chamber of Commerce."

Petitioner contends that there is an

abundance of evidence in the records to support its claim if "read in the light most favorable" (to the Petitioner), sufficient to require that this Court set aside the summary judgment.

The crucial question of exceptional importance and genuine issue of material fact addressed in Petitioner's petition for Rehearing in the Sixth Circuit court of Appeals was: Whether UKB undertook to act as, and was in fact, the negotiating bank in regard to this L/C?

Petitioner argues that UKB was the Negotiating Bank, that UKB accepted the documents required to negotiate the Credit, that UKB approached Respondant, the confirming bank, for payment against the documents; that Respondant wrongfully dishonored the Credit.

In its May 1, 1990, decision the Court of Appeals found that UKB was not the nego-

tiator of the Credit, and by inference, the Petitioner's arguments concerning the presentation of documents to any bank were moot. The court apparently reached this conclusion by way of its previous statement, finding it significant that: "The undisputed testimony of the UKB's officer, who was responsible for dealing with Petitioner's affairs, was that at no time did UKB negotiate the letter of credit."

Far from the standard for summary judgment imposed in Blakeman (above), the evidence submitted by Petitioner "together with all inferences..." not only does dispute the Hassanain testimony but traces the activities of this same bank's officer in UKB's undertaking to, and subsequently acting as, the Negotiating Bank for this Credit. (See Appellant's Petition for Rehearing, pp.1,3-5,7,8).

A letter of credit itself is a method

of payment created to facilitate the transaction between buyer and seller. It is not a contrivance for the benefit of the banks.

Negotiation of a L/C is a process by which specified documents are given over by the Beneficiary or his agent to a bank which acknowledges their conformity with those called for in the L/C and which then presents them to the bank obligated to make payment.

In the ordinary course of events, the negotiating bank and the confirming bank would be one. Due to Respondent's bizarre wording in its Amendment No.9, even Respondent itself anticipates that UKB will present drafts "on behalf of the Beneficiary" and distribute the proceeds of the L/C - functions of the negotiating bank.

Both, the V-P of BoCal., Peter Parsons Affidavit and the Gary Dilley's (his assistant) deposition state unequivocally that

the UKB was the negotiating bank. Testimony of these two bank experts familiar with this particular L/C contrasted with that of a UKB officer,in an adverse position to Petitioner, and whose paper trail and activity belie his testimony, which certainly creates a condition of "sufficient disagreement to require submission to a jury."

Quoting again from the Sixth Circuit Decision, page 3:

"A court deciding a motion for summary judgment must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S.242,251-52(1986).

The record shows both intent and action on part of UKB to negotiate the Credit. Expert testimony states: UKB was the negotiating bank in this instance. The lower courts

have improperly based their findings only on conflicting testimony by UKB officer Hassa-anain, and representations by Respondent, which refused to pay on the Credit. In this, the element of conclusiveness required for summary judgment is greatly lacking.

The Amendment No. 9:

When Respondent prepared its unauthorized Amendment No. 9 on May 29, 1981, it introduced a number of complications into the letter of credit system which ultimately led to the non-payment of this L/C. Through this "amendment" the Respondent bank attempted to change the nature of the Credit from that of a freely negotiable irrevocable credit to an irrevocable straight credit which would have required the beneficiary to present the documents to Respondent itself on July 10, 1981, the expiration date of the L/C. It thus attempted to restrict the Petitioner's freedom of action.

From this point on, Respondent brazenly acted as if it were in full control of the Credit and the underlying transaction; and also as if it had no need to cooperate with either the Beneficiary, or UKB, which was to act as the negotiating bank on the Credit.

The acting out of these assumptions may explain why the lower courts have believed that UKB did not negotiate the Credit and that Respondent acted correctly in disregarding the interests of the Beneficiary (Petitioner) in communications with the holders of assignments of proceeds.

One characteristic of this Amendment No. 9 should be beyond dispute: That is that it directly violates the regulations governing letters of credit developed by the International Chamber of Commerce, the ICC. The following is in application of the ICC provisions, and UCP Articles in regards to this Amendment No. 9:

1. Neither the Taipei Bank, nor the Beneficiary of the Credit (Petitioner, San Francisco) agreed to this amendment. In fact, the day prior to its issuance the issuing bank (Taipeibank) had expressly rejected any changes initiated by the Respondent.

An Irrevocable Letter of Credit "can neither be amended nor canceled without the agreement of all parties thereto." UCP Art.3(c).

2. The clause in "Amendment No. 9" conditioning payment on receipt of funds from another bank constitutes a "soft confirmation", which the ICC Banking Commission states is not provided for by the UCP.

...such a credit could not be considered to be an irrevocable credit in the terms of Art. 3(c), because one party can cancel the credit without the consent of the beneficiary in the event of such third party reimbursement not being forthcoming. Further

any "confirmation" of such credit is not, therefore, the confirmation envisaged in UCP Art. 3(b). Opinions of the ICC Banking Commission (1980-81),p13.

In the Court of Appeals, Petitioner presented its legal theory that estoppel and waiver apply to this case:

a - that Respondent is estopped from claiming late shipment as a reason for non-payment on the Credit because it was the cause for the delay,

b - that UKB as the negotiating bank waived any discrepancies in the documents when it accepted and reviewed them (at the time of the 1st tender).

Since UKB acted as the negotiator, and it made a document examination on or about July 10, 1981, and did not itself object, the fact that another bank did refuse to accept the documents after the expiry date has no effect on the Petitioner's right to

payment. There is little evidence, and the district court does not make any findings in regard to the character of these claimed discrepancies.

"However", the Court of Appeals stated in its May 1 decision, "appellant's argument assumes that UKB acted as a negotiator of the letter of credit when in fact it did not."

Despite the District Court's contentions, it is curious that Respondent had no obligation in this regard with these undefined "parallel obligations" of confirmation hovering about, and the fact that Respondent had taken the $2,000 "confirmation fee".

The Sixth Circuit Court of Appeals evidently did not consider as a "genuine issue of material fact" Respondent role in:

a) causing the carrier to relinquish its contract with coresponding losses,

b) thwarting the Beneficiary's ability to meet the shipping date, and thus creating an obstacle to his obtaining payment under the letter of credit.

Under the summary judgment standard, the possibility of tortious misrepresentation or negligence, which ultimately led to the very delays complained of and used as exculpatory means to avoid liability are too great to be dismissed summarily. The Court is reminded that a mere possibility of the facts being determined in some manner that would tip the scales differently on this question, i.e. should the letter of credit have been honored, would rule out summary judgment and require reversal of the decision.

A key issue upon which this controversy hinges, and a subsidiary question which the Petitioner asks this Court to consider, is that of the obligation of a confirming bank

to take appropriate action in furtherance of the beneficiary's interest insofar as they relate to the bank's confirmation; and does the confirming bank have a correlative obligation to the issuing bank and holders of assignments of proceeds against the letter of credit?

The vessel EASTERN HORNET had been chartered through Cerbere & Co., London, to transport the coal to Taiwan; Cerbere had accepted an assignment of proceeds as payment for the freight charges. In late June of 1981, Cerbere merely sought to have Respondent authenticate the confirmation of the Credit from which its assignment of proceeds was to be derived. This authentication was to be key test telexed to its bank, Banco Uriquijo, Madrid, Spain.

Instead of a key-tested confirmation of the Credit to its bank as requested, Respondent sent a telex to Cerbere, the charterer

stating that "No proceeds can be distributed until they are received in our bank.

1. The Beneficiary of the L/C had not requested Respondent to confirm the Credit, but because of the bank's actions in interjecting itself into the situation it was fait accompli.

2. Respondent's reply message to the offices of Cerbere, rather than to its bank, Banco Uriquijo, was not in accordance with instructions. Owners of vessels will never bring their ships into foreign ports unless their banks have been advised of the confirmation of credit.

The Petitioner argues that the conclusive cause of this muddled state of affairs impairing commerce was caused by the aberrational Amendment No. 9 and Respondent's flaunting of the rules for letters of credit established to facilitate international trade.

Petitioner has argued before the lower courts that it was unjustly precluded from meeting the shipping date, and that Respondent's conduct in this matter was the proximate cause.

Request for authentication of the Credit was not on behalf of Petitioner but for the above explained purposes of the Charterer, Cerbere & Comp.

The District Court erred in taking the view that there was no particular "duty" on the part of Respondent to "send telexes" on behalf of Petitioner, and refers to a "misunderstanding" or error in transmission.

However, the record discloses that the only "misunderstanding" was that the carrier's Banco Uriquijo sought to obtain verification that the Credit had been confirmed. (The requirement and procedure for key testing are discussed in the Petition for Rehearing, page 7.).

Even if it could be argued that no form of contractual arrangement existed between Respondent and Petitioner that would give rise to a duty, such argument is clearly undermined by the Court's finding (page 6 of the Opinion) that Respondent "contacted" Cerbere and spoke to them about the credit situation. This definitely amounts to some degree of undertaking of responsibility in this connection.

Financial messages exchanged telegraphically between banks both authorize and advise of activity in the demand deposit accounts of the various parties to an international payment transaction. Obviously security is a key issue in the exchange of these financial messages, and banks have devised system of authenticating messages to make sure that the person giving the payment instruction is in fact authorized to do so. Each cable or telex containing instruc-

tions to pay out money must have a special code called a test key. The test key serves the same function as does the bank's signature on a cashier's check (see KINGMAN et al., 1986, p.44). With the disputed testimony and interpretation about the meaning and inferences concerning the unilateral amendment of a letter of credit, violations of the UCP, the identity of the negotiating bank and its responsibilities, the timeliness of presentation of documents, and the conduct of Respondent, especially in regard to the Cerbere affair - it is inconceivable that a Federal Court can find conclusively that there exist no genuine issues as to material fact requiring submission to a jury. If anything, it should be through the chain of events and the evidence produced by the Petitioner, which point toward the essential soundness of Petitioner's Case.

The Courts, by their decisions in this

case, have embarked on a new path in which we can forsee the decline and fall of the significance of "Documentary Evidence" as a factor in adjudicating legal confrontations.

Mr. Hassanain, UKB's VP testified that his bank did not act as a negotiating bank, nor did he engage in such similar activity for UKB. The District Court in its decision, and the Court of Appeals in its decision and oral arguments sided with his unsupported testimony, in spite of documentary evidence to the contrary, presented by Petitioner.

Has Petitioner really violated Mr. Hassanain's rights by confronting him with a flury of documentary evidence which totally belie his statements?

Not so ! - Facts proved by a document or a duly authenticated copy thereof are "documentary evidence", and "are not objectionable as violative of an accused's alleged constitutional rights to be confronted by

the witnesses against him." (People v. Purcell, 22 Cal.App.2d 126.).

THE CURRENT CASE LAW

A well reasoned series of decisions showing Petitioner has satisfied the fundamental requirements of a negotiating bank, and cases showing that banks deal in documents, not goods - and thus are precluded from interfering in underlying negotiations between buyer and seller are presented. Other cases concerning modification of letters of credit by unauthorized parties are also presented:

COMMERCIAL BANK v. GOTHAM ORIGINALS, 486 NYS2d 715 (CT APP 1985)

The bank was originally designated an advising bank, it became a negotiating bank by purchasing signed drafts drawn under the letter of credit by the transferee beneficiary.

UNITED BANK LIMITED v. CAMBRIDGE SPORTING

GOODS CORP., 41 NY2d 254, 360 N.E 2d 943 (1976).

Banks deal in documents and not in goods and are not responsible for any breach of warranty or non-conformity of the goods involved in the underlying sales contract.

M.J.SALES & DISTRIBUTING CO., INC., (bankruptcy) 25 B.R. 608(1982).

A bank pays with its own funds, and not from assets belonging to debtor who caused the L/C of credit to be used.

BANCO NATIONAL DE DESAROLLA v. MELLON BANK, N.A., CIV. A No. 82- 0938, US District Court, Western District, Virginia (Mar. 11,1983).

When there is no evidence that the Beneficiary explicitly consented to modification of letter of credit by amendment, notice of provisions of amendment was ineffective.

S.A. v. TRADE BANK & TRUST, 21 A.D.2d 187, 249 NYS2d 557, 16 NY2d 698, 209 N.E2d

551(1965).

Letter of credit complied in timely fashion but was unjustifiably prevented from doing so.

LUSTRELON, INC. v. PRUTACHER, 178 N.J. Super. 128, 482 A2d 518(App Div 1981) U.C.C 1-201-(19) official comment (1977)

Good faith is defined as honesty.

WERNER v. A.L.GROOTEMAAT & SONS, 259 N.W.2d 310,315 n.22.(1977)

It appears to the Court ... that the bank had acted in its own interest in accepting an assignment of the proceeds of the Credit. Therefore, in light of said assignment, the advising bank became in essence the beneficiary of the letter of credit.

PUBALI BANK v. CITY NATIONAL BANK, 676 F2d 1326(1982)

... the bank [acted] first as an advising bank or correspondent to the overseas issuing bank, and second as "lender cre-

ditor" of the beneficiary. The Court allowed the direct action by reasoning that the bank could not hide behind the cloak of a neutral advising bank. The court stated that it was holding the bank jointly liable because it had acted in its own self-interest.

BANK OF AMERICA v. WHITNEY-CENTRAL NATIONAL BANK,(5th Cir)291 F 929

...the L/C as an instrument for financing trade is the primary consideration. Any other rule would destroy the effectiveness of this valuable commercial device. The Court cannot impose any condition which is not contained in the letter of credit.

ASBURY PARK & OCEAN GROVE BANK v. NATIONAL CITY BANK, 35 N.Y.S2d 985

This case presents a question somewhat different from that found in the cases cited. The Supreme Court was not authorized to impose any condition not contained in a letter of credit.

PETITIONER'S CLAIM FOR DAMAGES

Petitioner was a new company at the time of the transaction. Its initial contract was with China Rebar, November 19, 1980, for the supply of steam coal, which was quickly followed by Petitioner's contract with Lucky Cement on January 30, 1981. This one called for an earlier shipping schedule then China Rebar. Later, on July 6, 1981 Petitioner and Union Far East Corp. of San Francisco, agent for Thailand Power Company, a Thai Government Agency, entered into another steam coal supply contract [1],[2].

Petitioner was in the enviable position of shipping on three contracts when Respondent wrongfully sabotaged the Lucky Cement contract at the last possible moment by breaking its contractual duties as confirmation bank. This action asphyxied not only the Lucky Cement contract but the two other

contracts as well, as the purchasers naturally became skeptical over Petitioner's capability to ship, particularly in view of the fact that Petitioner was a new, yet 'un-proven' company.

The Petitioner's signed steam coal contracts provided for a total shipment through the year 1986 for a maximum of 1,525,000 Metric Tons with an option at the end of 1986 to extend steam coal contract for 3,325,000 through the year of 1991.

Thus, Respondent's actions totally and forever destroyed Petitioner as a business entity. As result of this transaction Petitioner lost all three contracts. During the Year 1983 twenty different persons as suppliers for these coal contracts gave deposition consisting of a total of over 6,300 pages transcribed. In addition, two other deposers gave video-taped and audio-taped depositions in Athens, Greece, consisting of

about 10 hours of taped transcripts.

Petitioner's claimed damages are for lost profits on these three contracts, proof of which is submitted in Petitioner's "Feister Affidavit" [3]. The amount of damages for breach of contract is established by the Kentucky Law [4] standards for the Calculation of Lost Profits: Net Profits in particular [5], and Lost Profits of a New Business [6].

Petitioner claims damages against Respondent in amount of $11,312,416.22.

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[1] see docket NR-239: (photocopies of these contracts are identified as attachments A,B, C) dated Nov.25,1986, attached as Exhibit 27.

[2] see docket NR-124: President of Union Far East, Deposition, dated June 30, 1983.

[3] 25-C.J.S. Damages 42. pp. 735-736.

[4] HENDERSON v. NAT'L FIDEL.LIFE INS. CO, 257 F2d-917, 919 (10th Cir., 1958).

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[5] KELLERMAN v. PEDMAN, Ky, 411 S.W.2d 315 (1967); KOPLIN v. KAULKNER, Ky, 239 S.W.2d 467 (1956); PAULINE'S CHICKEN VILLA, INC., v. KFC CORP., Ky, 701 S.W.2d 399 (1985).

CONCLUSION

The issues herein are transcending the interests of the parties involved. A proper resolution is mandatory for all entities interacting financially with domestic or foreign establishments through letters of credit, including the United States Government and the international banking community. It is now up to the United States Supreme Court to determine the reach of the respective laws for letters of credit.

For these reasons, a Writ of Certiorari should be issued to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

OCT 0 8 1990

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